of such a purchaser; but only in as good a position as a creditor with a specific lien. On this ground the defrauded vendor was allowed to recover property from the trustee, in the more carefully considered case of Re J. S. Appel Co.,[8] which is the only other instance where the precise point has been presented. M. E. H.

Common Carrier — Forwarding Company.— When we recall that one of the connotations of the term "common carrier" is insurer, it becomes of vital importance to the various agencies attendant on transportation whether they shall be classed as common carriers or as ordinary bailees liable only for negligence. Is the mere contract to receive at one point and deliver to another sufficient, or must there be some relation to the act of carriage. Shall we class as a common carrier a freight forwarding company, whose business it is to collect less than carload lots from various shippers, pay the freight in its own name, and ship the combined carload to the common delivery point, making its profit from the "bulge" between the railroad's carload and less than carload rates? The Washington Supreme Court has answered this question in the affirmative, and thus held such an agency liable for the destruction by accidental fire of goods awaiting forwarding from its warehouse.[1]

The real service being performed by defendant at the time of the fire was that of warehouseman; so to hold it liable as a common carrier now, plaintiff must show that the storage was merely preparatory to a further carriage under defendant's liability, and that it would also have been liable if the goods had been destroyed en route.[2] Thus it is immaterial that defendant has hauled goods to the warehouse, since the question is whether the present storage was preparatory to a further carriage by him or by another.

Forwarding agents were common in the early history of transportation in this country. The necessity for such an intermediary between the shipper and the carrier arose from the fragmentary nature of the means of transportation, so that it required the services of an expert to select the most available route, railroad, tow-boat or lake steamer. The liability of such agencies was held to be only that of warehousemen, that is only for negligence while the goods were in their posses-

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[8] (1912), 198 Fed. 322.

[1] Kettenhofen v. Globe Transfer & Storage Co. (Oct. 30, 1912), Wash. 127 Pac. 295.

[2] Fitchburg & W. R. R. Co. v. Hanna (1856), 6 Gray 549, 66 Am. Dec. 427; Barron v. Eldridge (1868), 100 Mass. 455, 1 Am. Rep. 126; Barter v. Wheeler (1869), 49 N. H. 9, 6 Am. Rep. 434.

[3] Roberts v. Turner (1815), 12 Johns. (N. Y.), 232, 7 Am. Dec. 311; Platt v. Hibbard (1827), 7 Cow. (N. Y.), 497; Bush v. Miller (1852), 13 Barb. (N. Y.), 481; Maybin v. S. Car. Ry. Co. (1855), 8 Rich. Law (S.

sion.[3] A little later we find the forwarding agents acquiring some of the means by which they dispatched the goods forward; under such circumstances they were presumed to forward the goods by their own agency rather than another's, and were therefore held liable as common carriers from the time of delivery to them.[4] More recently the function of these early forwarding agents has been performed by express and dispatch transportation companies. Regarding the partial control of the goods during the carriage as sufficient to constitute the status of common carrier, the courts have included these companies within that category; notice that in the case of the express company[5] its messenger has personal charge of the goods during carriage, and the dispatch company[6] carries goods in its own cars. It would seem that the authority of cases dealing with such companies should not be relied on in the principal case, for here the absolute control over the goods is surrendered to the railroad by the forwarding company.

The rule laid down by the United States Supreme Court in the Express cases was that "a railroad is not a common carrier of common carriers."[7] Now the Interstate Commerce Commission has held that as between the railroad and a forwarding company the latter is not a common carrier but an ordinary shipper,[8] and this holding has been affirmed by the United States Supreme Court.[9] If as between the railroad and the forwarder, the latter is only a shipper or agent of a shipper, it is hard to see how its relation to the same goods can be any different when the question is between the agent and the owner.

There seems no good reason why the liability of defendant should not be limited as that of the early forwarding agents.[10] For now as then the owner may recover from the performing carrier[11] by showing

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C.), 240, 64 Am. Dec. 753; Am. Ex. Co. v. 2nd Natl. Bank (1871), 69 Pa. St. 394, 8 Am. Rep. 268.

[4] Teall v. Sears (1850), 9 Barb. (N. Y.) 317; Blossom v. Griffith (1856), 13 N. Y. 569; Ladue v. Griffith (1862), 25 N. Y. 364, 82 Am. Dec. 360.

[5] Buckland v. Adams Ex. Co. (1867), 97 Mass. 124, 93 Am. Dec. 68 Bank of Ky. v. Adams Ex. Co. (1876), 93 U. S. 174. Contra in early California case: Hooper v. Wells Fargo Co. (1864), 27 Cal. 11, 85 Am. Dec. 211. But now under Public Utilities Act, (Dec., 1911), Art. I, Sec. 1 (L), an express company is a common carrier.

[6] Mer. Disp. & Transprn. Co. v. Cornforth (1877), 3 Col. 280, 25 Am. Rep. 757; Fischer v. Mer. Disp. & Transprn. Co. (1883), 13 Mo. App. 133; Block v. Mer. Disp. & Transprn. Co (1888), 86 Tenn. 392, 6 S. W. 881; Cownie Co. v. Mer. Disp. & Transprn. Co (1906), 130 Ia. 327, 106 N. W. 749.

[7] Express Cases (1885), 117 U. S. 1.

[8] Cal. Commercial Assn. v. Wells Fargo Co. (1908), 14 I. C. C. 422; Export Shipping Co. v. Wabash Ry. Co (1908), 14 I. C. C. 437.

[9] Int. Com. Comm. v. Del. L. & W. Ry. Co. (1910), 220 U. S. 235.

[10] Beale & Wyman, Railroad Rate Regulation (1906), Sec. 97; Hutchinson on Carriers, 3rd ed. (1906), Secs. 71 and 72.

[11] N. J. Nav. Co. v. Mer. Bank (1847), 6 How. (U. S.) 344; Hersh-

himself to be the undisclosed principal of the agent who dealt with the railroad. The forwarding company may not even allow the railroad to limit its liability without the consent of the shipper.[12]

R. W. M.

Constitution — State and Municipal Control of Public Utility Franchises.— Until October 10, 1911, Section 19 of Article XI of the Constitution of 1879 provided that "any individual or any company duly incorporated for such purpose . . . shall . . . have the privilege of using the public streets and thoroughfares" of cities, for the purpose of laying mains or erecting poles and wires, for water and light distribution. This privilege was subject only to the right of the city to regulate service rates and damages for the use. The Supreme Court of California has uniformly held this section to be a direct grant of power[1] to the public service company, whereby it might without legislative or municipal sanction install in the city streets its poles and wires or its gas and water mains. This right, when acted upon, constituted a franchise,[2] real property,[3] of the nature of an easement in the public streets,[4] with which a city or town could not interfere by imposing additional burdens.[2] So, by a single constitutional clause, the State of California gave away street franchises which are in other States considered of immense value to the municipality for control of public utilities and for revenue.

But in October, 1911, the section was so revised[5] as to declare that **all** public utilities may be established and operated **"upon such conditions** and under such regulations as the municipality may prescribe under its organic law." And the Supreme Court has given full effect to the letter and spirit of the section, as amended, by ruling[6] that it places the entire subject of public utilities, in relation to franchises and otherwise, within the control of the various municipal corporations, under their charter powers. Construing the key phrase "upon such conditions" to mean something wider than the ordinary police regulations, the court denied a gas company the right of laying mains in new streets until it should obtain a franchise and the permission of the board of public works, under ordinances of the city of Los Angeles.

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field v. Adams (1855), 19 Barb. (N. Y.) 577; Stannard v. Prince (1876), 64 N. Y. 300.

[12] Blair v. Am. Forwarding Co., 159 Ill. App. 511.

[1] People v. Stephens, 62 Cal. 209 (1882).

[2] In re Johnston, 137 Cal. 115, 69 Pac. 973 (1902).

[3] South Pasadena v. Pasadena, 152 Cal. 586, 93 Pac. 490 (1908).

[4] Stockton Gas & Elec. Co. v. San Joaquin County, 148 Cal. 313, 83 Pac. 54, 5 L. R. A. (N. S.) 174 (1905); San Francisco v. Oakland Water Co., 148 Cal. 331, 83 Pac. 61 (1905).

[5] See Statutes of 1911, p. 2180.

[6] In re Russell, 44 Cal. Dec. 352, 126 Pac. 875; Decided Sept. 13, 1912.